

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OLSON KUNDIG, INC.,

Plaintiff,

v.

12TH AVENUE IRON, INC.,

Defendant.

CASE NO. C22-0825JLR

MINUTE ORDER

The following minute order is made by the direction of the court, the Honorable James L. Robart:

Before the court is Plaintiff Olson Kundig, Inc.’s (“Olson Kundig”) motion for entry of default judgment against Defendant 12th Avenue Iron, Inc. (“12th Avenue”). (Mot. (Dkt. # 52).) In its motion, Olson Kundig seeks an award of attorneys’ fees in the amount of \$130,896.04 on its claims under the Lanham Act, the Patent Act, the Washington Consumer Protection Act, and the Washington Personality Rights Act (the “recoverable claims”). (*Id.* at 14-15.) Because there is no statute entitling Olson Kundig

1 to fees with respect to its breach of contract claim, Olson Kundig does not seek an award
2 of fees for work performed on that claim. (*See generally id.*)

3 Although Olson Kundig is only entitled to recover fees on some of its claims,
4 Olson Kundig's counsel does not segregate its billing entries by claim. (*See generally*
5 *Hodges Decl. (Dkt. # 53) ¶ 17, Ex. E.*) As such, the court is unable to assess whether the
6 hours spent preparing Olson Kundig's recoverable claims were reasonable. Additionally,
7 while the Patent Act and Lanham Act authorize district courts to award attorneys' fees to
8 prevailing parties in "exceptional cases," 35 U.S.C. § 285; 15 U.S.C. § 1117(a), Olson
9 Kundig fails to discuss why its case is "exceptional" under the test set forth in *Octane*
10 *Fitness, LLC v. ICON Health & Fitness, Inc.* See 572 U.S. 545, 554-57 & n.6 (2014)
11 (applying a "totality of the circumstances" test to fee claims under the Patent Act and
12 setting forth factors to be considered); *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839
13 F.3d 1179, 1180 (9th Cir. 2016) (making the *Octane Fitness* test applicable to fee claims
14 under the Lanham Act); (*see generally* Mot. at 14-15).

15 Accordingly, the court ORDERS Olson Kundig to submit, by **April 12, 2023**, a
16 supplemental brief not to exceed 1400 words that analyzes whether an award of
17 attorneys' fees on its Patent Act and Lanham Act claims is warranted under the test set
18 forth in *Octane Fitness*. Additionally, Olson Kundig must either (1) segregate its billing
19 records by claim so that the court can assess the hours spent preparing only Olson
20 Kundig's recoverable claims, or (2) if Olson Kundig's breach of contract claim is so
21 intertwined with its recoverable claims that segregation would be impossible, Olson
22 Kundig must propose a percentage downward adjustment to its total fee request to

1 represent the work done on its breach of contract claim. *See, e.g., Safeworks, LLC v.*
2 *Teupen Am., LLC*, No. C08-12197, 2010 WL 3033711, at *3-4 (W.D. Wash. July 29,
3 2010) (first citing *Gracie v. Gracie*, 217 F.3d 1060, 1069-70 (9th Cir. 2000); and then
4 citing *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1157-58 (9th Cir. 2002)).

5 Filed and entered this 3rd day of April, 2023.

6 RAVI SUBRAMANIAN
7 Clerk of Court

8 s/ Ashleigh Drecktrah
9 Deputy Clerk
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